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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STEPHEN PFAHLER et al., Plaintiffs and Respondents, v. MELVIN WALLACE et al., Defendants, Cross-complainants and Respondents, COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al., Defendants, Cross-defendants and Appellants.	B205880 (Los Angeles County Super. Ct. No. BC 363359)

APPEAL from orders of the Superior Court of Los Angeles County, Helen I. Bendix, Judge. Affirmed.

Jose A. Mendoza; Gemmill Thornton & Baldridge, Bruce M. Thornton, and Carlos V. Yguico for Defendants, Cross-defendants and Appellants.

Ecoff, Law & Salomons and Lawrence C. Ecoff for Plaintiffs and Respondents.

Snyder Dorenfeld, David K. Dorenfeld and Rodger S. Greiner for Defendants, Cross-complainants and Respondents.

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Coldwell Banker Residential Brokerage Company (Coldwell Banker) and Mickey Nathans (sometimes collectively appellants) appeal an order of the trial court denying their motions to compel arbitration of this action and for a stay of proceedings. The trial court found appellants waived the right to compel arbitration. We find substantial evidence in the record to support the court's determination and therefore affirm.

FACTS

This lawsuit arises from the May 2005 sale by Molly and Melvin Wallace (the Wallaces)[1] of their home in Calabasas, California to Jolie and Stephen Pfahler (the Pfahlers) (sometimes collectively respondents). At the time of sale, the Wallaces were real estate sales agents with Coldwell Banker, which acted as the listing broker for the property. The Pfahlers were represented in the transaction by Nathans, who acted as their real estate sales agent. Nathans also was affiliated with Coldwell Banker and worked out of the same office as the Wallaces.

PROCEDURAL HISTORY

1. The Pfahlers' Complaint

In December 2006, the Pfahlers filed a complaint against the Wallaces, Coldwell Banker and other defendants, including the home inspector. They alleged the Wallaces failed to disclose material defects in the property in connection with the sale.

The Pfahlers asserted claims including breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and deceit (intentional misrepresentation), negligent misrepresentation, fraud and deceit (concealment), negligent concealment and rescission against the Wallaces and negligence against Coldwell Banker.

The Pfahlers contended at the time of sale the Wallaces made numerous disclosures, including that the home had been repaired following the 1994 Northridge Earthquake, but they failed to disclose that the home was deemed a complete tear down and that geologists hired by their insurer concluded their home could not be repaired. The Wallaces allegedly

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[1] The Wallaces are parties individually and as trustees of the Wallace Family Trust.

accepted payment from their insurance company, made only minor cosmetic repairs and sold their home to the Pfahlers without disclosing such defects.

The Pfahlers claimed the majority of the home -- including the kitchen, breakfast room, dining room, family room, as well as adjoining hallways and all of the upstairs immediately above those rooms, together with the master bedroom and bathroom -- substantially tilts and slopes approximately four and a half inches.

The complaint alleged the Wallaces were longtime real estate agents who conducted the sale through their employer, Coldwell Banker. The Pfahlers contended Coldwell Banker, as the listing agent and real estate broker, owed them a duty to conduct a reasonably competent and diligent visual inspection of the property and to disclose all facts materially affecting the value or desirability of the property. The Pfahlers alleged Coldwell Banker breached this duty by negligently failing to discover or disclose the defects in the property.

The Pfahlers attached to their complaint a copy of the purchase agreement between themselves and the Wallaces that included provisions for resolution of disputes.[2]

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[2] Paragraph 17 of the purchase agreement is entitled "DISPUTE RESOLUTION."

Paragraph 17.A. states: "MEDIATION: Buyer and Seller *agree to mediate* any dispute or claim arising between them out of this Agreement, or any resulting transaction, *before resorting to arbitration or court action*. . . ." (Italics added, boldface omitted.)

Paragraph 17.B. states: "ARBITRATION OF DISPUTES: (1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, *which is not settled through mediation*, shall be decided by neutral, binding arbitration . . . . The arbitrator . . . shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. *Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act.* [¶] . . . [¶] (3) BROKERS: Buyer and Seller agree *to mediate and arbitrate* disputes or claims involving either or both Brokers, consistent with 17A and B, provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or *within a reasonable time after*, the dispute or claim is presented to Brokers. . . ." (Italics added, boldface omitted.)

In February 2007, Coldwell Banker answered the complaint and pleaded a "written arbitration agreement" as one of its affirmative defenses.

2. The Wallaces' Cross-complaint

In March 2007, the Wallaces answered the complaint and filed a cross-complaint against Coldwell Banker and Nathans for equitable indemnity, apportionment of comparative negligence and declaratory relief.[3] The Wallaces alleged that a manager of Coldwell Banker had assured them Coldwell Banker would defend and indemnify them if they acted as the selling agents in connection with the sale of their own home. They alleged that had they not received those assurances they would have retained an independent broker to represent their interests.

3. Case Management Statement and Trial Setting

In March 2007, Coldwell Banker filed a case management statement with the trial court requesting a jury trial. Coldwell Banker also indicated the parties had met and conferred with all other parties and the parties had agreed to submit to mediation. Coldwell Banker's case management statement failed to mention any issue regarding arbitration despite the fact that the Judicial Council approved form contained a specific section requesting the parties' positions as to alternate dispute resolution.[4]

It is not disputed that Coldwell Banker was the broker for both buyer and seller under the purchase agreement.

[3] The Wallaces alleged in an affirmative defense that the Pfahlers' complaint was barred by arbitration provisions in the purchase agreement. However, the Pfahlers and the Wallaces subsequently stipulated as between themselves not to enforce any arbitration agreement that may have existed between them, as discussed *post*.

[4] The form provided, at paragraph 10.d.: "The party or parties are willing to participate in (*check all that apply*): [¶] (1) ☒ Mediation [¶] . . . [¶] (5) ☐ Binding private arbitration . . . ." Coldwell Banker checked only the box for "Mediation" and did not check the box requesting binding private arbitration.

Coldwell Banker then appeared and participated in a case management conference before the trial court in early April 2007. At the case management conference, the court set a trial date for January 2008, apparently without objection from the parties.

In late April 2007, Coldwell Banker and Nathans (represented by the same counsel that had previously appeared for Coldwell Banker) filed an answer to the Wallaces' cross-complaint and pleaded a "written arbitration agreement" as an affirmative defense.

4. Commencement of Discovery and Motion Practice Before the Trial Court

Between February and July 2007, Coldwell Banker (and, after she appeared, Nathans) served written discovery, responded to written discovery, received discovery from other parties, received documents from third parties, participated in several depositions, participated in a property inspection and allowed discovery motions to proceed before the trial court.[5] Respondent Molly Wallace was deposed on July 19, 2007. Counsel for Coldwell Banker and Nathans attended the deposition. Appellant Nathans was deposed on July 27, 2007. Nathans apparently appeared for her deposition and submitted to examination without objection.

5. Motions to Compel Arbitration

On July 31, 2007, Coldwell Banker and Nathans filed a motion (1) to compel arbitration of the Wallaces' claims for indemnity in the cross-complaint, and (2) for an order staying the cross-complaint during the pendency of the arbitration proceeding under Code of

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[5] Coldwell Banker propounded on the Pfahlers 342 separate form interrogatories, 54 special interrogatories and 46 document production demands. It received from the Pfahlers 152 form interrogatory responses, 54 special interrogatory responses and 46 separate responses to production demands. It responded to 50 form interrogatories, 69 special interrogatories, 77 production demands and 31 requests for admission propounded by the Pfahlers. Coldwell Banker received 221 form interrogatory responses, 154 special interrogatory responses, 67 responses to requests for production of documents and 29 requests for admission exchanged by the other parties to the lawsuit as well. Discovery in the action additionally involved numerous third party subpoenas, depositions and production of thousands of pages of documents. The discovery is further discussed at footnote 10, *post.*

Civil Procedure section 1281.4.[6] The declaration of the office manager of Coldwell Banker's Calabasas office that accompanied the motion simply stated (1) Nathans was an independent contractor sales associate, not an employee, and (2) the Wallaces also were independent contractor sales associates, not employees. The manager attached as exhibits copies of the independent contractor agreements executed between the Wallaces and Coldwell Banker.[7]

Three weeks later, on August 21, 2007, Coldwell Banker filed a petition to compel arbitration of the Pfahlers' complaint and to stay the action based on the arbitration clause contained in the purchase agreement between the Pfahlers and the Wallaces. Coldwell Banker based its motion on the Federal Arbitration Act (9 U.S.C. §§ 1-16) (FAA) and section 1281.2. The motion contended that arbitration would resolve all claims and disputes between Coldwell Banker and the Pfahlers. In support of the motion, Coldwell Banker

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[6] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[7] Each of the independent contractor agreements signed by the Wallaces and Coldwell Banker states under paragraph 8, "**ARBITRATION**": "(A) . . . [I]n the event of a dispute between ASSOCIATE and COLDWELL BANKER, or any COLDWELL BANKER officer or employee, arising out of the relationship of the parties to this Agreement or the performance thereunder, . . . said dispute shall be submitted to a neutral arbitrator selected by COLDWELL BANKER. . . . The decision of arbitration will be final and binding upon all parties. . . . [¶] . . . [¶] (C) The Parties agree that COLDWELL BANKER is engaged in interstate commerce, and that the provisions of the Federal Arbitration Act, 9 U.S.C. Section 1, at seq [*sic*] apply to this Agreement." An appendix to each agreement provides in Paragraph 3, "**EXCLUSIONS**," that the provisions of the appendix regarding "defense of ASSOCIATE and limitation on ASSOCIATE'S liability do not apply to . . . any claim arising from a transaction where the ASSOCIATE acted outside of the course and scope of his or her authority as defined in the Independent Contractor Agreement, which includes acting as a Principal . . . ." The appendix further provides in paragraph 6: "**INDEMNIFICATION**. ASSOCIATE shall indemnify and hold harmless COLDWELL BANKER against all losses and damages . . . which COLDWELL BANKER incurs or becomes liable for resulting from the excluded claims defined in Paragraph 3 above."

offered the declaration of its counsel, which merely attached a copy of the Pfahlers' complaint.

Coldwell Banker and Nathans set both motions to compel arbitration and stay to be heard in October 2007.

6. Unsuccessful Efforts to Expedite Motions

The Wallaces immediately applied ex parte to advance the motions to compel arbitration in view of the impending January 2008 trial and discovery cutoff. In their August 30, 2007 application, the Wallaces argued: "The parties have engaged in extensive written discovery in this matter, and have also taken several depositions. The parties have also selected a Mediator and were in the process of scheduling a Mediation. The Wallaces assert that Coldwell Banker's Motion to Compel Arbitration is not well taken and should be denied. Nevertheless, even if the Motion were meritorious, all parties need to know as soon as possible whether arbitration will be compelled, as it will [a]ffect every aspect of the case from that decision forward, including what discovery procedures are available, which issues will be decided by the assigned Judge and which by an Arbitrator, the time frame for various events, and the costs and fees involved."

In support of the ex parte application, the Wallaces proffered a declaration of their counsel, which informed the court: "Since . . . April 25, 2007, Coldwell Banker and Nathans actively and meaningfully participated in every aspect of this litigation, including the selection of a mediator, propounding and responding to written discovery, attending depositions, etc. However, since filing the Motion, they have refused to participate in discovery any further. [¶] . . . Trial in this matter is set for January 22, 2008. [¶] . . . My clients need to continue to prepare their case. They cannot afford to wait for six weeks until Coldwell Banker's Motion is heard, at least not without jeopardizing their ability to be

timely ready for trial. [¶] . . . [¶] [I]t is imperative that the Motion be heard on shortened time and as soon as possible."[8]

Together with their ex parte application for an order advancing the hearing date the Wallaces submitted their opposition to the motions to compel arbitration, noting that there would be no issue of prejudice to the moving parties since the Wallaces' opposition was complete.

The Pfahlers also applied ex parte to advance the motions to compel arbitration. The Pfahlers noted the discovery cutoff was presently set for December 24, 2007, and the final status conference for January 11, 2008. They informed the court that "there are numerous depositions which have been noticed and scheduled, certain discovery is outstanding and Coldwell Banker's responses to written discovery are overdue, and the parties agreed to participate in mediation in September 2007."[9] Meanwhile, Coldwell Banker refused to provide promised supplemental discovery responses or to participate in discovery while its motions were pending, even while setting the arbitration motions well ahead in October 2007. The Pfahlers stated they were being prejudiced in their ability to complete their discovery and to prepare for trial in light of Coldwell Banker's self-imposed refusal to participate in discovery and mediation. The Pfahlers' counsel proffered a declaration attesting to these facts and listed the pending discovery. As did the Wallaces, the Pfahlers served and filed their opposition to the pending motions along with their application to advance the hearing date.

The trial court denied the ex parte applications.

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[8] Counsel indicated the other parties did not object to the Wallaces' ex parte application.

[9] In August 2007, in a written stipulation filed with the court, the parties stipulated to extend a mediation completion date from September 6, 2007, to October 22, 2007, because "the parties have been unable to complete the necessary investigation and discovery so as to provide for a meaningful mediation."

7. Trial Judge's Recusal and Case Reassignment

Before the motions to compel arbitration could be heard on the scheduled October 2007 date, the trial judge recused herself, and the proceedings were transferred to another judge. After the recusal, Coldwell Banker and Nathans took no action to have their motions reset for hearing, and the Pfahlers successfully applied ex parte for a new hearing date.

The trial court ultimately heard the petitions to compel arbitration in January 2008, the original time of trial.

8. Showing in Support of and in Opposition to Arbitration

In support of their motions to compel arbitration, Coldwell Banker and Nathans attempted to characterize the complaint and cross-complaint as involving separate and independent disputes subject to different agreements for arbitration.

First, respecting the cross-complaint brought by the Wallaces, Coldwell Banker and Nathans characterized the issue as whether they owed a duty to indemnify the Wallaces based on the written independent contractor agreements between the Wallaces and Coldwell Banker. Coldwell Banker asserted that because the Wallaces were arguing the independent contractor agreements were superseded by a subsequent oral discussion with a manager, "resolving that dispute [i.e., the cross-complaint for indemnity] has nothing to do with what happened during the events leading up to the close of escrow." Coldwell Banker claimed there had been no discovery exchanged "in connection with that [indemnity] dispute."

Second, Coldwell Banker and Nathans argued they were third party beneficiaries of the arbitration clause in the purchase agreement between the Pfahlers and the Wallaces. They admitted "part of" the damages in the indemnity dispute would "overlap" damages claimed in the complaint, but argued virtually no discovery had been undertaken regarding "indemnity."

The Pfahlers denied they were parties to any arbitration agreement with Coldwell Banker and argued Coldwell Banker's participation in discovery and court proceedings

waived the right to compel arbitration.[10] The Wallaces argued in their deemed opposition to the motions for arbitration that the six-month delay in seeking arbitration caused them to expend nearly $50,000 in attorney fees in defending the claims alleged in the complaint.[11]

9. Denial of Motions to Arbitrate Upon Finding of Waiver

A. Court's Tentative Ruling

At the hearing of the motions to compel arbitration, the trial court provided a detailed written tentative ruling, complete with analysis and record and case citations. Among other things, the court indicated in its tentative ruling that "the papers raise serious waiver issues. It is undisputed that all parties participated in significant written and deposition discovery over several months before even filing the instant motions, respectively on 7/31/07 and 8/21/07, which was after the first judge in this case set the 1/08 trial date. [Citations.] The opposing papers demonstrate prejudice in terms of expenses incurred in getting ready for the trial, which the initial judge set on 4/12/07. It is significant that apparently, at no time while this discovery was occurring, did the moving parties seek a stay pending ruling on a motion to compel arbitration; indeed, the moving parties propounded discovery and attended

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[10] Counsel for the Pfahlers listed 18 discovery documents exchanged between the Pfahlers and Coldwell Banker between March 2007 and the end of July 2007. He further listed 13 other discovery documents exchanged by other parties and served upon Coldwell Banker during this period. He stated there were three depositions taken in this time that counsel for Coldwell Banker attended and two others that its counsel did not attend but for which transcripts were available. Counsel indicated the Pfahlers subpoenaed thousands of pages of documents from a third party that also were made available to Coldwell Banker.

[11] In opposition to the motions for arbitration, counsel for the Wallaces provided a declaration stating that the Wallaces previously had wished to seek arbitration but the Pfahlers had taken the position arbitration was precluded because Coldwell Banker was not a party to the purchase agreement. In February 2007, therefore, the Wallaces and the Pfahlers signed a written stipulation agreeing to suspend any attempt to compel arbitration and to move forward with the litigation to avoid having at least one case in the court system and at least one case in arbitration. Counsel further declared that, as of the end of August 2007, the Wallaces had incurred almost $50,000 in fees and costs in connection with the litigation. Almost half of that amount was incurred after Coldwell Banker answered the complaint and entered the litigation.

depositions for several months before even filing a motion to compel arbitration. [Citation.] The trial court also heard motions to compel discovery. [Citation.]"

The tentative ruling explained that "the moving parties attempt to avoid [the conclusion there was a waiver] by trying to parse the significance of their discovery activities in an attempt to segregate those efforts to defending against the Complaint. The court respectfully suggests that such a bright line is not immediately obvious and the moving parties have not cited any case in support of such an argument. It would appear that information obtained in litigating the Complaint is not unrelated or irrelevant to the claims in the Cross-Complaint. Analogously, for purposes of determining leave to file a cross-action, the rule is that cross-complaints for indemnity are virtually always related to the main action. [Citation.]"

The tentative ruling also indicated the purchase agreement provided for discovery "'*[a]fter* the appointment of the arbitrator . . . .'" (italics added) and the moving parties' participation in discovery before even seeking to compel arbitration appeared inconsistent with the purchase agreement. Similarly, the agreement provided for discovery pursuant to section 1283.05, subdivision (e), which provides for deposition only with the leave of the arbitrator. The court tentatively found that "discovery occurred here that would not necessarily have been allowed if discovery had occurred under the umbrella of an arbitration instead of a trial court. [Citation.]"

The trial court tentatively ruled that Coldwell Banker and Nathans had waived any entitlement to arbitration, specifically finding they had allowed a substantial amount of discovery to go forward, a trial date to be set and a discovery motion to be decided by the court without taking any action to stop those events from occurring. They had sought no stay of proceedings, had noticed depositions as a matter of right without obtaining prior leave from an arbitrator and undertook discovery that could not have gone forward without an arbitrator in place. As to the purchase agreement between the Pfahlers and the Wallaces, the tentative ruling expressly found that Coldwell Banker and Nathans, as third party

beneficiaries of the arbitration clause, had not opted for arbitration within a "reasonable" time as required under the agreement.[12]

B. Continuance to Allow Parties to Provide Additional Evidence

After providing a tentative ruling, the trial court decided to allow the parties further opportunity to proffer any additional evidence they wished the court to review before ruling on the motions to compel arbitration. The court particularly invited information regarding why the motions for arbitration were not brought earlier. The court continued the hearing for a day to allow the parties to respond to its invitation.

C. Failure to Proffer Additional Evidence

When the court convened again, counsel for Coldwell Banker and Nathans informed the court they "weren't going to present anymore evidence."

D. Denial of Motions for Arbitration

The trial court then denied both motions for arbitration and incorporated its tentative ruling into its minute order. Among other things, the court expressly found Coldwell Banker and Nathans had waived any claimed right to arbitration. This timely appeal followed.

STANDARD OF REVIEW

In general, the question whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact, and, if supported by sufficient evidence, the trial court's finding regarding waiver is binding on the appellate court. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*); *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319 (*Platt*); see also *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "When, however, the facts are undisputed *and* only one inference may reasonably be drawn, the issue is one of law and the reviewing court

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[12] Even though the arbitration clause was raised as an affirmative defense in the answer, the court found Coldwell Banker and Nathans did not act within a reasonable time to move to compel arbitration or request a stay of proceedings pending decision of such a motion, all the while garnering substantial benefits from litigating in court.

is not bound by the trial court's ruling." (*Platt, supra,* at p. 319, italics added; see also *St. Agnes, supra,* at p. 1196.) "If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211 (*Davis*).) Moreover, "[t]here is no single determinative test of waiver . . . . For us, the question is whether the trial court's decision is supported by substantial evidence. If it is, we must affirm. If not, we may decide the issue as a matter of law." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 (*Guess*).)

DISCUSSION

1. Waiver of Arbitration

In *St. Agnes,* the California Supreme Court noted that although the FAA generally preempts any contrary state law regarding the enforceability of arbitration agreements, applicable federal and state rules are very similar. (*St. Agnes, supra,* 31 Cal.4th at p. 1194, citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 405.) As the court explained, "the FAA provides: 'A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' (9 U.S.C. § 2.) A district court, upon being satisfied that the issue in controversy is arbitrable, 'shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.' (9 U.S.C. § 3.)" (*St. Agnes, supra,* at p. 1194.) The court stated, "In California, section 1281 similarly provides: 'A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' Section 1281.2 provides in relevant part: 'On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the

controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner . . . .'" (*Ibid*.)

The federal principle of "default" is analogous to waiver, but "'"the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred."'" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Accordingly, a party resisting arbitration on the ground of waiver bears a heavy burden, such that any doubts regarding a claim of waiver should be resolved in favor of arbitration. (*Ibid.*)

As noted, there is no single test under federal or state law to determine if a party moving to compel arbitration has waived the right to arbitrate. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) In *St. Agnes*, *supra*, at page 1196, our Supreme Court cited with approval the factors listed in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980 (*Sobremonte*) to determine whether a waiver has occurred: "'(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.'" (*Sobremonte*, *supra*, at p. 992, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467-468.)

Reviewing the *Sobremonte* factors, we hold the trial court did not err in ruling appellants waived any agreement to arbitrate.

Appellants' actions were inconsistent with a demand for arbitration. Coldwell Banker filed a case management statement requesting a jury trial and agreeing to submit to mediation. It also failed to select binding private arbitration even though that was one of the available choices on the case management statement form. Coldwell Banker then

participated in the case management conference and allowed the trial court to set the matter for trial without raising any arbitration issue. When Nathans appeared in the action, neither Coldwell Banker nor Nathans informed the court of a desire for arbitration. Neither made any prompt effort to raise the issue of arbitration or to seek a stay of proceedings to prevent the parties from incurring additional litigation expenses. Coldwell Banker took substantial discovery, and both parties actively participated in the litigation. Although arbitration was raised as an affirmative defense in the answers, for months afterwards appellants took no steps toward enforcement of an arbitration agreement. A defendant's invoking of an arbitration agreement in an affirmative defense does not preclude a finding the defendant's subsequent litigation conduct waived the right to compel arbitration. (*Sobremonte*, *supra*, 61 Cal.App.4th at p. 993; *Davis*, *supra*, 59 Cal.App.4th at p. 217.)

Appellants delayed in seeking to compel arbitration until eight months after the litigation began, six months after Coldwell Banker answered the complaint and three months after Coldwell Banker and Nathans answered the cross-complaint. The parties were well into trial preparation before appellants notified the other parties of their intent to arbitrate. When appellants brought the first motion to compel arbitration, the court had already been asked to decide discovery disputes involving hundreds of pages of materials submitted for the court's consideration. Substantial court resources were invoked before appellants even took the first step to compel arbitration. Appellants then did not move promptly to have their arbitration motions heard but set the hearings far beyond minimum notice requirements. After the trial judge recused herself, appellants made no effort to reset the matter for hearing. Indeed, although the first motion had been made in late July, the arbitration motions ultimately were not heard until more than five months later.

While deferring a request for arbitration, appellants participated in discovery that might not have occurred in arbitration without the consent of the arbitrator or at least until after an arbitrator was appointed. The purchase agreement provided the parties "shall have the right to discovery in accordance with . . . §1283.05." Section 1283.05, subdivision (a) provides the parties to the arbitration shall have the right to take depositions and to obtain discovery only *"[a]fter* the appointment of the arbitrator or arbitrators . . . ." (Italics added.)

Section 1283.05, subdivision (e) further states that "[d]epositions for discovery shall not be taken *unless leave to do so is first granted by the arbitrator or arbitrators.*" (Italics added.) The delay in seeking arbitration allowed appellants to participate in the deposition process as a matter of right, and the trial court found such would not necessarily have been allowed if leave had to be sought from an arbitrator.

This situation is similar to *Guess, supra*, 79 Cal.App.4th 553, in which the party moving to compel arbitration waited four months before bringing its motion, meanwhile serving document demands and propounding interrogatories and scheduling third party depositions. (*Id.* at p. 556.) The trial court nevertheless ordered arbitration, and Division One of this District granted a petition for a writ of mandate directing the trial court to vacate its order. (*Id.* at p. 559.) The moving party through its attorneys had known about the contractual arbitration provisions since before the lawsuit and, as here, had no explanation for its decision to defer its demand for arbitration; it fully participated in the discovery process, never once suggesting discovery should be barred because the dispute had to be arbitrated; it took full advantage of the opportunity to test the validity of the opposing party's claims, and through its use of the discovery process learned about the opposing party's trial tactics, "certainly more so than would have been required in the arbitral arena." (*Id.* at pp. 557-558.) The court stated, "Simply put, '"[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."' [Citation.]" (*Id.* at p. 558.)

Based on all the evidence before it, the trial court could properly infer that appellants waived arbitration through their conduct. That is not the end of the inquiry regarding waiver of the right to arbitration, however, because there must also be prejudice to the opposing parties, as discussed below.

2. Prejudice

Under federal law, the presence or absence of prejudice from litigating the dispute is sometimes stated to be "the determinative issue." (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 188; see also *St. Agnes, supra*, 31 Cal.4th at p. 1203; *American Recovery v. Computerized Thermal Imaging* (4th Cir. 1996) 96 F.3d 88, 95-96.) "In

California, whether or not litigation results in prejudice also is critical in waiver determinations." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1203.) Prejudice can be found in circumstances including those in which (1) the moving party's conduct has impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration, (2) the moving party has used the judicial process to gain information about the other side's case that could not have been gained through arbitration, or (3) a party has unduly delayed and waited until the eve of trial to seek arbitration. (*Id.* at p. 1204.)

All three of these factors support the trial court's finding here that respondents suffered prejudice from appellants' conduct. Appellants delayed in moving for arbitration and allowed full blown litigation to proceed involving numerous interrogatories, voluminous document productions, requests for admission, depositions and third party subpoenas requiring resort to the court to resolve discovery disputes. Such conduct generated substantial costs to the other parties and impaired their ability to take advantage of the benefits and efficiencies of arbitration. The Wallaces presented evidence they incurred $50,000 in litigation costs, almost half of which was expended after appellants entered the litigation. Judging from the discovery listed by counsel between Coldwell Banker and the Pfahlers, they too incurred substantial costs in litigation prior to the motions to compel arbitration. Appellants also had the benefit of discovery from third parties made available to them through the judicial process that the trial court found could not have been gained through arbitration. Further, appellants unduly delayed and waited until almost the last minute before the discovery cutoff and trial to seek arbitration, well knowing they intended to invoke arbitration provisions in the agreements. It cannot escape our attention that Coldwell Banker selected "mediation" and failed to request "binding private arbitration" in its case management statement. Both appellants later voluntarily entered into stipulations to use the court's mediation process, requiring other parties to prepare for a mediation that ultimately did not occur because of appellants' intervening motions to compel arbitration.

This case is similar to *Davis*, a case in which the court found that defendants, who asserted an arbitration clause in their answers, then served the plaintiff with a discovery demand, took the plaintiff's deposition, propounded interrogatories on plaintiff, and

responded to plaintiff's interrogatories and a request for documents, before filing a motion to compel arbitration six months after answering the complaint, had waived their right to arbitrate. (*Davis*, *supra*, 59 Cal.App.4th at pp. 212-213.) As the court stated, "a defendant should timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation." (*Id.* at p. 216.)

Much of appellants' briefing and arguments center on whether the arbitration provisions are applicable to appellants or whether the FAA applies to both agreements, but, as we have discussed, *ante*, the trial court's findings of waiver and prejudice are well supported regardless of whether state law or the FAA applies.

3. Court's Jurisdiction to Decide Waiver Issue

Relying on *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79 (*Howsam*), appellants argue for the first time on appeal that the trial court exceeded its authority in deciding respondents' claims of arbitration waiver. We disagree, for several reasons.

First, under basic appellate principles, appellants have arguably waived the issue by failing to raise it in the trial court. (*Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1129; *People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46.) Such a rule is based on fairness in that "it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal; and it also reflects principles of *estoppel* and *waiver* . . . ." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:229, p. 8-155 (rev. #1, 2008).)

Second, even assuming appellants did not waive the argument, it has no merit. In *Howsam*, *supra*, 537 U.S. 79, the United States Supreme Court was asked to decide whether the court or an arbitrator should apply a National Association of Securities Dealers (NASD) rule that a dispute is not eligible for submission to arbitration after six years have elapsed from the event giving rise to the dispute. (*Id.* at p. 81.) The high court concluded there was a presumption that the arbitrator should decide "'allegation[s] of waiver, delay, or a like defense to arbitrability.'" (*Id.* at p. 84, quoting *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.) In reaching this conclusion, the Supreme Court explained that a "gateway dispute" about whether the parties are bound by a particular arbitration

clause raised a "'question of arbitrability'" for a *court* to decide. (*Id.* at p. 84.) The NASD time limit rule, however, fell within a class of "gateway *procedural* disputes" not presenting such "'questions of arbitrability'" for the court. (*Id.* at p. 85, italics added.)

Howsam was followed in *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 962-964 (*Omar*), a Division Two decision relied on by appellants. *Omar* held the issue whether the appellants in the case had waived the right to compel arbitration must be decided in the first instance by the arbitrator and not the court. (*Id.* at p. 964.) As the Pfahlers note, however, *Omar* clearly explained that "where the delay is *unrelated to the litigation process*, 'it is improper for the judge to decide this issue.'" (*Id.* at p. 963, italics added.) *Omar* went on to state that because all of the resisting party's waiver allegations in the case concerned *nonlitigation* conduct, such as a failure to agree to pay the costs of arbitration, the issues involved "contract interpretation and arbitration procedures, which are more properly subjects of determination by an arbitrator than the court." (*Id.* at p. 964.) Respondents' allegations in the present case raise the issue of waiver in context of appellants' *litigation* conduct, and *Omar* thus does not apply to this case.[13]

Third, we find the discussion in *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228 of more assistance in determining this issue. In *Thorup*, the court explained, "Because arbitration is an alternative to litigation, a party who actively participates in a lawsuit and thereby resorts to the courts to resolve the dispute may be found, through such inconsistent behavior, to have relinquished its right to arbitrate. [Citing federal authorities.] [¶] Because such a waiver is based upon conduct related to the judicial process, the existence of waiver is a question for the courts to decide." (*Id.* at p. 234.) Here,

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13 Appellants attempt in their briefs to parse the events in terms of whether they occurred before or after the filing of the Wallaces' cross-complaint. We do not view the overall litigation conduct with such a narrow perspective, given that Coldwell Banker was involved in the litigation since inception, its liability essentially was based on respondeat superior and the same attorneys who represented Coldwell Banker also later represented Nathans.

all the conduct on which respondents based their claim of waiver centered on appellants' litigation conduct. The court, equally with the opposing parties, was as much a victim of appellants' delay in the instant case. It would stand judicial principles on their head to hold an arbitrator more capable than the court of assessing the effect of conduct related to the judicial process.[14]

In light of our holding, we need not reach appellants' other contentions or respondents' contention that having part of this controversy decided through arbitration and part through this court action would lead to unnecessary expense, case management complexities and inconsistent results.

DISPOSITION

The orders are affirmed. Respondents are to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.*

We concur:

DOI TODD, ACTING P. J.

ASHMANN-GERST, J.

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[14] We need not address appellants' contention that the FAA applies in determining whether waiver is an issue for the court or the arbitrator because the result is the same whether state or federal law applies.

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.